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**Paper for the Subcommittee on the
draft Criminal Jurisdiction Ordinance
(Amendment of Section 2(2)) Order 2002**

The Criminal Jurisdiction Ordinance (Cap. 461) ("the Ordinance") makes provisions about the jurisdiction of courts in Hong Kong in relation to the two groups of offences specified in section 2 of the Ordinance (referred to in the Ordinance as "Group A offences" and "Group B offences"). Group A offences are theft or deception related offences in the Theft Ordinance (Cap. 210), and forgery related offences in the Crimes Ordinance (Cap. 200). Group B offences are conspiracy, attempting or incitement to commit a Group A offence, and conspiracy to defraud.

2. Members may recall that the objects of the draft Criminal Jurisdiction Ordinance (Amendment of Section 2(2)) Order 2002 ("the draft Order") are to add the following three computer offences to the Ordinance as Group A offences so that the jurisdiction rules in the Ordinance apply to those computer offences:

- (a) Unauthorized access to computer by telecommunications (section 27A, Telecommunications Ordinance (Cap. 106));
- (b) Destroying or damaging property (section 60, Crimes Ordinances, but limited to misuse of a computer); and
- (c) Access to computer with criminal or dishonest intent (section 161, Crimes Ordinance (Cap.200)).

3. In previous meetings, members noted that in the United Kingdom ("UK"), provisions about the jurisdiction of courts in relation to computer offences are contained in a separate piece of legislation known as the Computer Misuse Act 1990 (a copy is in LC Paper No. CB(2)1324/02-03). The Act deals with the following three computer offences:

- (a) Unauthorised access to computer material (section 1 of the Act);
- (b) Unauthorised access with intent to commit or facilitate commission of further offences (section 2 of the Act); and
- (c) Unauthorised modification of computer material (section 3 of the Act).

4. At the meeting of the Subcommittee on 13 October 2003, a member was concerned whether jurisdiction rules of computer offences should be contained in a separate piece of legislation. This paper compares the provisions in the Criminal Jurisdiction Ordinance with those in the UK Computer Misuse Act to assist members.

Location of offence

5. Section 3 of the Ordinance provides that, for the purpose of determining whether or not a particular event is a relevant event, any question as to where it occurred is to be disregarded, and a person may be guilty of the offence if any of the relevant events occurred in Hong Kong. In relation to a Group A offence, a "relevant event" means "any act or omission or other event (including result of one or more acts or omissions) proof of which is required for conviction of the offence".

6. A similar provision could be found in section 4 of the Computer Misuse Act. The section provides that for the purposes of any offence under section 1 (i.e. unauthorised access to computer material) or section 3 (i.e. unauthorised modification of computer material) of the Act, it is immaterial whether any act or other event proof of which is required for conviction occurred in UK, or whether the accused was in UK at the time of such act or event, provided that at least one significant link with UK must exist in the circumstances of the case. In the Act, "a significant link" essentially means that the accused was in UK when he did the act, or the target computer was in UK (section 5). No significant link is required for an offence in section 2 of the Act (unauthorised access with intent to commit or facilitate commission of further offences).

Citizenship or nationality immaterial

7. Section 4(1) of the Ordinance provides that a person may be guilty of a Group A or Group B offence whatever his citizenship or nationality or whether or not he was a permanent resident of Hong Kong at any material time, and whether or not he was in Hong Kong at any such time.

8. There are similar provisions in the Computer Misuse Act. Section 9 of the Act provides that in proceedings brought in England and Wales, it is immaterial to guilt whether or not the accused was a British citizen at the time of the act, omission or event. Also, section 4(1)(b) of the Act provides that it is immaterial for the purposes of an offence under sections 1 or 3 of the Act (details of the offences are in paragraph 6 above) whether the accused was in UK at the time of such act or event.

Conspiracy etc. not occurred in Hong Kong is immaterial for conviction

9. Section 4(2) of the Ordinance provides that on a charge of conspiracy to commit a Group A, or conspiracy to defraud in Hong Kong, the defendant may be guilty whether or not he became a party in Hong Kong, or any act or omission in relation to the conspiracy occurred

in Hong Kong. Section 4(3) provides that a person may be guilty of attempting to commit a Group A offence, whether or not the attempt was made in Hong Kong, or it had an effect in Hong Kong. Section 4(4) provides that on a charge of incitement to commit a Group A offence, the defendant may be guilty whether or not the incitement took place in Hong Kong.

10. Similar provisions in the context of the UK can be found in section 6 of the Computer Misuse Act.

What constitutes conspiracy, attempt or incitement in Hong Kong

11. Section 6 of the Ordinance provides what constitutes a conspiracy to commit a Group A offence or of conspiracy to defraud in Hong Kong, and that the conspiracy is triable in Hong Kong. The section also provides what constitutes attempting to commit or incitement to commit a Group A offence in Hong Kong.

12. Similar provisions in the context of the UK can be found in section 7 of the Computer Misuse Act.

Relevance of external law

13. Section 7 of the Ordinance provides that a person is guilty of conspiracy to commit a Group A offence, or of conspiracy to defraud only if the pursuit of the agreed course of conduct would at some stage involve-

- (a) an act or omission by one or more of the parties; or
- (b) the happening of some other event,

constituting an offence under the law in force where the act, omission or other event was intended to take place. A similar double criminality rule is prescribed for attempting to commit or incitement to commit a Group A offence.

14. Similar provisions in the context of the UK are found in section 8(1) to (4) of the Computer Misuse Act.

Proof of external law

15. Under section 8 of the Ordinance, the condition of double criminality is deemed to be satisfied unless the defence serves on the prosecution a notice that the defence is of the opinion that the condition is not satisfied.

16. Similar provision in the context of the UK can be found in section 8(5) of the Computer Misuse Act.

Other provisions in the Computer Misuse Act

17. The Computer Misuse Act also contains provisions on power of search or seizure, giving jurisdiction to magistrate's courts, limitation period for prosecution, conviction for an alternative offence, search warrants, extradition etc. These matters are not covered in the Criminal Jurisdiction Ordinance but there are equivalent provisions in other Ordinances.

Representations of legal professional bodies

18. The Hong Kong Bar Association has written to the subcommittee that it has no objection in principle to the proposed amendment, that the proposed amendment exposes the inadequate collection of legislation which criminalizes misuse of computers in Hong Kong, that there is an urgent need to undertake a fundamental review of Hong Kong legislation in this field, and that there would be greater merit including extra territorial provisions in specifically tailored legislation rather than shoe-horn these provisions into the Criminal Jurisdiction Ordinance (letter from the Hong Kong Bar Association has been circulated via LC Paper No. CB(2)425/03-04(01)).

19. The Law Society of Hong Kong has also written to the Subcommittee. It has pointed out that section 2 of the Computer Misuse Act was more carefully drafted in certain areas. The Society has also reiterated its concerns on the way law enforcement bodies are seizing computers and the possible adverse effects to a business (the letter from the Law Society has been circulated to members via LC Paper No. CB(2)310/03-04).

Conclusion

20. It would appear that the jurisdiction rules in the UK Computer Misuse Act are essentially the same as in the Criminal Jurisdiction Ordinance. Thus when the three computer offences are added, the effect would be that the jurisdiction rules in relation to them are essentially the same as for the computer offences included in the UK Computer Misuse Act. Members may also note that the Computer Misuse Act 1990 was enacted three years before the enactment of the Criminal Justice Act 1993. Despite these observations, the problems stated by the Hong Kong Bar Association and the Law Society of Hong Kong could not be addressed in the draft Order, especially on the point whether a piece of specifically tailored legislation is desirable. Members may wish to consider whether and when to address those issues.

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